IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of CURTIS MARTEN.	)	No. 61923-3-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: March 1, 2010

Appelwick, J. — In this sexually violent predator proceeding, Marten contends for the first time on appeal that he is denied due process, because his involuntary commitment is based upon the medically invalid diagnosis of paraphilia NOS nonconsent, and the overbroad and imprecise diagnosis of personality disorder NOS with antisocial and schizoid features. Because he did not present these evidentiary arguments to the trial court in a Frye[1] hearing or an ER 702 objection, he does not present a manifest constitutional error that may be raised for the first time on appeal.

Marten challenges the sufficiency of the evidence that he committed a "recent overt act," but the State's expert testified that Marten's recent conduct followed his pattern of offending and he was at a very high risk of taking the next step and reoffending. Viewed in a light most favorable to the State, there is

[1] Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).

sufficient evidence of a recent overt act.

Finally, Marten challenges a statement by the State's expert in violation of an order in limine as misconduct requiring reversal. But, the curative instruction given by the trial court adequately addressed the irregularity.

We therefore affirm Marten's commitment as a sexually violent predator under chapter 71.09 RCW.

FACTS

In February 1997, Curtis Marten turned himself into police and told them he had been going around to small businesses run by women. He would schedule appointments or purchase items and then continue to visit with the women in an effort to develop relationships with them. He used a false name and obtained a manicure from T.N., a Vietnamese woman working at a nail salon in West Seattle. He returned and asked to purchase some nail polish. When T.N. reached for the nail polish, he grabbed her buttocks. T.N. ran to another area and yelled at Marten to leave. He grabbed her arm and pulled her into the bathroom where he attempted to grab her breasts. She struggled to get away. Marten told her he loved her and exposed himself before leaving. Two days later, Marten drove by the nail salon and phoned T.N. to say he was sorry.

At about the same time, he approached K.Z., a 19 year old woman from Honduras, who was pregnant and on her way to a doctor appointment. Marten used a false name, gave her a ride, and bought her breakfast. As they sat in his car, he asked if he could use his video camera to film her pregnant belly. When

she refused, he reached over and tried to pull her shirt over her breasts. She pulled her shirt back down. He reached around her pinning her down. She screamed and struggled and was able to get out of the car.

Marten told the police that he knew something was wrong with him and that he was "out of control." He told a detective that he had been visiting several other small businesses run by women. Seattle police learned that Marten was being investigated by the Algona police for similar conduct regarding N.S., an Asian woman who ran a deli. For several months, Marten waited for N.S. every Saturday morning when she opened the deli at 5:00 a.m. He would enter the store and order coffee and would frequently park and wait outside the deli. On one occasion Marten went into the store, spent about 15 minutes in the bathroom and then told N.S. the toilet was clogged and he needed to show her how to fix it. N.S. told Marten she would have a maintenance person handle it, but Marten asked N.S. to take a look 3-4 times. N.S. called her husband and stayed on the phone with him until Marten left. She later found a large bundle of paper towels stuffed into the toilet. Police observed Marten outside the store as early as 4:00 a.m., waiting until N.S. opened the store at 5:00 a.m. He parked several blocks away and was seen lurking near a dumpster.

Based upon the incidents involving T.N. and K.Z., Marten pleaded guilty to unlawful imprisonment and to indecent liberties with forcible compulsion. Marten participated in a sex offender treatment program for a year, until he was released in 2000. He entered into Phase III of treatment but was terminated for

noncompliance. He repeatedly violated conditions of his community supervision and was in and out of jail, including several 90 day sanctions and one 6 month sanction.

In August 2002, while on "escape" status from the Department of Corrections, Marten contacted five women, all of Asian or Hispanic descent, in separate incidents. All five were small and worked in tanning, hair, or nail salons. On August 19 he gave a false name to A.M., a 17-year-old working alone at a tanning salon in Bothell. He entered the salon, asked strange questions, left, sat in his car and starred at A.M. for 10 minutes, drove away, returned 10 minutes later, and asked for a tan. Because A.M. was uncomfortable being alone around Marten, she telephoned her manager who came to the salon and had A.M. leave while Marten was in the tanning bed. Two days later Marten called, asked for A.M., and scheduled a tanning session for that same day. A.M. got a friend to stay with her while Marten tanned. After Marten left he called A.M. and asked why she "looked so good?" Marten called for A.M. several times. When told he could not call or come to the salon again, he became angry and shouted an obscenity into the phone.

K.N., the owner of a nail salon, is Vietnamese. Marten entered the salon and made "weird" requests. On several occasions, Marten sat outside the business and watched K.N. Marten came over to her car one time as she was leaving work and said that he had run out of gas and offered to take her to dinner if she would help him. When she refused, Marten became upset and

walked away.

Marten also approached T.N.T., who is Vietnamese and works at a nail salon next door to K.N.'s business. Marten approached T.N.T. in the parking lot and said he was out of gas. When she tried to leave, Marten said he only needed 5 minutes of her time. Marten asked her where she lives and asked for her help again. When T.N.T. refused and left, Marten followed her in his car.

M.V.P. is also Vietnamese and works in a hair salon next to one of the nail salons. Martin entered her business to make appointments. He contacted M.V.P. in the parking lot and said he had run out of gas and needed her help. She later saw Marten's car near her home. Marten acted "strangely" and videotaped M.V.P. one day as she left the hair salon.

The State filed a petition to commit Marten as a sexually violent predator (SVP).

At trial, Dr. Leslie Rawlings, the State's expert witness, reviewed Marten's history that included a 1984 incident in Los Angeles, California, where Marten pulled a woman into his car while holding his hand over her mouth. He held her down, reclined the seat, climbed on top of her, and touched her breasts. When he started to remove her clothing, she screamed and kicked and was able to get out of the car. In 1991, Marten was charged with exposing himself to a woman. In 1994, he was charged with sexual abuse/physical touching.

Dr. Rawlings testified that Marten suffered from paraphilia not otherwise specified (NOS) nonconsent and personality disorder with antisocial and

schizoid features. Dr. Rawlings used three actuarial instruments to perform a risk assessment: the Static 99, the Minnesota Sex Offender Screening Tool-Revised, and the Sex Offender Risk Appraisal Guide. Dr. Rawlings concluded Marten has a high risk of reoffending.

Dr. Rawlins concluded that Marten's paraphilia NOS nonconsent and personality disorder with antisocial and schizoid features make it difficult for him to control his sexually violent behavior, and that he was more likely than not to commit another sexually violent offense if not confined.

Dr. Rawlins testified that during Marten's year of sex offender treatment, several high risk behaviors were identified as part of Marten's offense cycle. Dr. Rawlins concluded that Marten's behaviors toward the five women in August 2002 were recent overt acts, because they included high risk behaviors that "reflected that he was at a very increased risk for taking the next step, which would have been to offend."

Defense expert Theodore Donaldson disputed the validity of Dr. Rawlings's diagnosis of paraphilia NOS nonconsent and maintained that a personality disorder alone was insufficient to support a sexually violent predator (SVP) commitment, because it is merely a history of antisocial acts and does not cause a person to engage in any particular kind of behavior. He concluded that the evidence was insufficient to establish that Marten met the SVP criteria.

The jury found that Marten is an SVP, and the trial court ordered him committed.

DECISION

I. Diagnosis of Mental Abnormalities

Marten contends his civil commitment as an SVP must be reversed, because the diagnosis of paraphilia NOS nonconsent is not generally recognized in the psychiatric field and the diagnosis of personality disorder is overbroad and imprecise.

He argues that paraphilia NOS nonconsent is not recognized by the psychiatric profession, and therefore the admission of Dr. Rawlings's testimony violated his due process rights. Under SVP commitment statutes, chapter 71.09 RCW, due process is satisfied "if a finding of dangerousness is linked to the existence of a mental abnormality or personality disorder that makes it seriously difficult for the person with the abnormality or disorder to control his or her behavior."[2] Marten contends that he may raise the issue for the first time on appeal, because it is a manifest error affecting a constitutional right.[3]

We rejected an essentially identical argument in Post, noting that it constituted an improper attempt to transform what should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal.[4] The challenge to the diagnosis should have been raised by means of a Frye hearing in the trial court.[5] Upon such a challenge, the trial court determines whether a scientific theory or principle "'has achieved

[2] In re Det. of Post, 145 Wn. App. 728, 755, 187 P.3d 803 (2008) (citing Kansas v. Crane, 534 U.S. 407, 410, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)), review granted, 166 Wn.2d 1033, 187 P.3d 803 (2008); see also In re Det. of Thorell, 149 Wn.2d 724, 761–62, 72 P.3d 708 (2003).
[3] RAP 2.5(a)(3).
[4] Post 145 Wn. App. at 755.
[5] Id. at 755–56.

general acceptance in the relevant scientific community.'"[6] A party's failure to raise a Frye challenge before the trial court generally precludes appellate review.[7] Because Marten did not raise the issue below, the State had no occasion to respond fully to the challenge he now makes. We decline to address the issue for the first time on appeal. Dr. Donaldson's testimony challenging the validity of the paraphilia NOS nonconsent diagnosis therefore goes to the weight of the evidence, not its admissibility.[8]

Marten raises a similar challenge to the diagnosis of personality disorder with antisocial and schizoid features. He argues that this diagnosis violates due process, because it is too imprecise and broad to differentiate dangerous sexual offenders from the typical criminal recidivist, and that the evidence was therefore not helpful to the trier of fact under ER 702.[9] But, because Marten did not challenge Dr. Rawlings's testimony on this basis below, he has waived the issue on appeal.[10]

Marten's challenge to the use of the diagnoses of paraphilia NOS nonconsent and personality disorder with antisocial and schizoid features has not been adequately preserved.[11]

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[6] In re Pers. Restraint of Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993) (quoting State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984)).

[7] See Post, 145 Wn. App. at 755–56; see also In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

[8] See Post, 145 Wn. App. at 757 n.19. The Post court also noted that numerous Washington courts have upheld SVP commitments based on a paraphilia NOS nonconsent diagnosis. Id. at 756–57.

[9] Under ER 702, an expert witness may offer an opinion "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

[10] See Post, 145 Wn. App. at 756 n.16.

[11] Because Marten failed to preserve an evidentiary challenge to paraphilia NOS nonconsent and antisocial personality disorder diagnoses under Frye and ER 702, we do not address the State's

II. Recent Overt Act

Marten challenges the sufficiency of the evidence of a recent overt act. If an individual is living in the community when an SVP petition is filed, the State must prove the individual has committed a recent overt act.[12] A "recent overt act" is "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act."[13] The evidence presented to the jury is viewed in a light most favorable to the State in evaluating whether there is sufficient evidence of a recent overt act.[14]

Marten argues that the incidents in 2002 did not involve acts of violence, sexual offenses, or any physical touching. He contends that his behavior may have been irritating or even harassing, but was not of a sexually violent nature. Because he barely spoke to the five women in 2002 and touched none of them, he argues that he did not exhibit serious difficulty controlling his behavior. But, he ignores the significance of Dr. Rawlings's testimony that he was engaging in high risk behavior that is part of his offense cycle.

The State does not have to show that Marten threatened or committed sexually violent harm. The State needed to prove only that Marten's conduct created a reasonable apprehension of sexually violent harm when objectively

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challenge to "unpublished and extrarecord" articles referred to in Marten's opening brief.

[12] RCW 71.09.060(1).

[13] Former RCW 71.09.020(10) (2002).

[14] In re Det. of Broten, 130 Wn. App. 326, 334, 122 P.3d 942 (2005).

viewed in light of his history.[15] Engaging in high risk behavior that is part of the individual's offense cycle can be sufficient to establish a recent overt act. In Broten the State's expert testified that Broten's actions in going to a park where children were playing was part of Broten's offense cycle and part of his buildup in anticipation of reoffending.[16] Even though Broten had no actual contact with the children, his act of going to the park was sufficient evidence of a recent overt act when viewed in light of his past history and his pattern of putting himself in high risk situations.[17]

In the very recent decision of In re Detention of Brown,[18] this court addressed the question whether a conviction for possessing child pornography satisfied the recent overt act requirement. Because Brown's offense cycle culminates in viewing child pornography just before actually targeting a child, this court concluded that the recent overt act requirement was satisfied.[19]

Here, Dr. Rawlins testified that in August 2002, Marten was engaging in high risk behaviors that are part of his offense cycle, the sequence of behaviors and circumstances that build up to offending. Marten's high risk behaviors identified in his year of sexual offender treatment included his targeting of Asian or Hispanic women, isolating or approaching the women when they are alone, giving false information, and sometimes carrying a video camera. Dr. Rawlings

[15] Former RCW 71.09.020(10).
[16] Broten 130 Wn. App. at 332–33.
[17] Broten. 130 Wn. App. at 335–36.
[18] No. 62383-4-I, 2010 WL 60896 (Wash. Ct. App. January 11, 2010).
[19] Id. at ¶ 27–29; See also In re Det. of Albrecht, 129 Wn. App. 243, 257, 118 P.3d 909 (2005) (in view of his pattern of using candy and money to promote contact with his victims, the jury was presented with sufficient evidence of a recent overt act where Albrecht offered a boy 50 cents to follow him and then attempted to grab the boy's arm).

concluded that Marten's high risk behaviors "reflected that he was at a very increased risk for taking the next step, which would have been to offend." This was sufficient evidence to go to the jury to determine whether an objective person aware of Marten's history would have a reasonable apprehension of harm of a sexually violent nature. There is sufficient evidence of a recent overt act.

III. Violation of Pretrial Order

Finally, Marten contends the trial court should have granted a mistrial when Dr. Rawlins violated the pretrial order precluding any reference to "rape" regarding his relationship with his wife. Marten's counsel argued in a pretrial motion that the prosecutor should not make any reference or suggestion that Marten had committed the crime of rape. The attorney for the State noted that they intended to go into an admission by Marten that he had sex with his wife when she didn't feel like it or didn't want to. The court ruled that it might be permissible to state that he has had sex with his wife when she didn't want to, but unless there was more to it, there should not be any reference to rape. During the direct examination of Dr. Rawlings, the prosecutor asked a general question about Marten's relationship with his wife:

> Q. And what, if anything, did [Marten] say to you about the nature or quality of his sexual relationship with [his wife]?
>
> A. Well, there were a couple of things. He didn't say it to me but he did say it, I believe, to a law enforcement officer on one occasion, that he had sexually assaulted her, that he had raped her on a couple of occasions.

The trial court sustained an objection and instructed the jury to disregard the answer.

Outside the presence of the jury later that day, and the next morning, Marten moved for a mistrial. The trial court expressed concern that Dr. Rawlings had been adding things to his testimony that were not called for and adopting the role of an advocate. The trial court denied the motion for a mistrial, but invited suggestions for a more detailed curative instruction. The court later gave the curative instruction proposed by Marten's counsel:

> Dr. Rawlings' use of the word "rape" in response to direct questions by [the prosecutor] regarding his interaction with his wife, which the Court instructed you to disregard, was contrary as to a specific pretrial order of the Court. The Court will instruct you that there has never been any incident of rape, as that word will be defined for you in the instructions, by Mr. Marten involving his wife reported to Dr. Rawlings.
>
> I will add that in response to the question by [the prosecutor], that question did not utilize the word "rape." The word "rape" was used by the witness in response to the question. You will recall that I sustained an objection to it and instructed you to disregard it. But I thought giving this instruction under these circumstances is appropriate.

Marten argues that especially in the context of the hostile tone of Dr. Rawlings's testimony, his misconduct in ignoring the pretrial ruling of the court not to use the word rape warranted a mistrial.

A respondent in a civil commitment proceeding has a constitutional right to a fair trial.[20] A mistrial is appropriate only when a trial irregularity so prejudices a defendant that nothing short of a new trial can ensure that the

[20] In re Det. of Ross, 114 Wn. App. 113, 121–22, 56 P.3d 602 (2002).

defendant will be tried fairly.[21] "Whether to grant a motion for mistrial is a matter addressed to the sound discretion of the trial court and is reviewed for an abuse of discretion."[22] A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable.[23] In determining whether the effect of an irregular occurrence at trial affected the trial's outcome, we examine: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.[24]

Marten argues that the curative instructions could not lift the taint created by Dr. Rawlings reference to "rape." A reference by an expert witness to rape in violation of an order in limine in a SVP trial is troublesome. But, the single comment and the trial court's response must be considered in context. Marten cites no additional testimony containing references to "rape" by Marten. The testimony about Marten's relationship with his wife was a minor part of the evidence presented in the 14 day trial. The battle of the experts focused on the significance of Marten's interactions with other women and whether that conduct revealed a serious difficulty controlling sexually violent behavior. The trial court gave an immediate curative instruction to disregard the answer, and later gave an expansive instruction proposed by Marten expressly informing the jury that there has "never been any incident of rape" by Marten of his wife. In this

[21] State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).
[22] Broten, 130 Wn. App. at 336.
[23] Id.
[24] State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

context, Marten does not establish that the curative instructions were ineffective or that the trial court abused its discretion by denying the motion for a mistrial.

Affirmed.

Appelwick, J.

WE CONCUR:

Edlington, J.

Becker, J.